IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.03.2005

Coram:

The Honourable Mr.MARKANDEY KATJU, Chief Justice

and

The Honourable Mr.Justice D.MURUGESAN

W.A.No. 2794 of 2002
and
W.A.M.P.No. 4720 of 2002

Madras Fertilizers Limited,
Manali,
Madrs - 600 068.
Rep. by its Chairman & Managing Director,
Mr.N.Y.Mahajan … Appellant/ Petitioner

vs.

1. The Customs, Excise and Gold (Control)
Appellate Tribunal,
South Regional Bench,
Sasthri Bhawan,
Haddows Road, Nungambakkam,
Chennai - 600 006.
Rep. by its Assistant Registrar

2. Office of the Commissioner of
Central Excise (Appeals),
Nungambakkam High Road,
Chennai - 600 034.

3. The Asst.Commissioner of Central Excise,
Chennai "A" Division, Commissionerate-I,
317, Anna Salai,
Chennai - 600 018.

4. The Superintendent of Central Excise,
317, Anna Salai,
Chennai - 600 018. … Respondents

Appeal filed under Clause 15 of the Letters Patent against the order passed in W.P.No.421 of 2001 dated 11.06.2001. (WP No.421/01 Presented under Article 226 of the Constitution of India to issue a Writ of certiorarified Mandamus calling for the records of the first respondent in Appeal No.13/St/162/99 and E/368/99 in final order No.548/2000 dated 26.4.2000 and of the

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Second respondent in original Appeal No.197/98 (M.I) dated 20.11.1998 and to quash the same and direct the second respondent to consider the appeal in merits the Appeal E No.156/98 (M.I) filed by the petitioner on 20.10.1998).

For Appellant :::: Mr.Arvind P. Datar,
Senior Counsel for
Mr.Utham Reddy

For Respondents 2 to 4 :::: Mr. V.T.Gopalan,
Addl. Solicitor General of India,
for Mr.S.Manikumar,
S.C.G.S.C

J U D G M E N T

THE HONOURABLE THE CHIEF JUSTICE

This writ appeal has been filed against the impugned judgment of the learned single Judge dated 11.06.2001.

2. We have heard the learned counsel for the parties, and have perused the impugned judgment and the records.

3. The appellant is a Public Sector Undertaking, and 51% of its shares are held by the Central Government. It is engaged in the manufacture of fertilizers. The relevant period in this case is from 05.03.1976 to 29.2.1977, for which period the appellant cleared complex fertilizers claiming the benefit of exemption under Notification No.25/70-CE dated 01.03.1970. The Assistant Collector had initially allowed the exemption on 05.03.1976, but the Department took the stand that the appellant was not entitled for the benefit of this notification and accordingly, a show cause notice dated 07.06.1976 was issued. The Assistant Collector subsequently passed an order confirming the denial of exemption against which order W.P.No.152 of 1977 was filed before this Court to quash the said order, and W.P.No.455 of 1977 claiming refund of duty paid on NPK fertilizers. These writ petitions were allowed by the learned single Judge, but subsequently W.A.Nos. 507 & 508 of 1980 were allowed in favour of the Department by a Division Bench of this Court by judgment dated 10.03.1986, which order was confirmed in appeal by the Supreme Court by its order dated 20.01.94.

4. Thus, the facts of the case disclose that the appellant had claimed the benefit of Notification No.25/70 issued under Rule 8 of the Central Excise Rules exempting mixed fertilizers falling under Item-14 of Schedule I to the Central Excise and Salt Act, 1944.

5. The issue as to whether the appellant was entitled to the benefit of the said notification went upto the Supreme Court, and

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the Supreme Court by its order dated 20.01.94 in Civil Appeal Nos. 4531 & 4532 of 1986 held that the mixture manufactured by the appellant does not satisfy all the conditions prescribed by the notification, and hence the appellant cannot get the benefit of the said notification. The appeals were consequently dismissed by the Supreme Court.

6. After dismissal of the appeal by the Supreme Court by its order dated 20.01.94, the Assistant Collector (Central Excise) wrote a letter to the appellant on 11.03.1994 demanding Rs.8.94 crores. This was disputed by the appellant, and the matter was discussed with the Principal Collector, who by letter dated 19.01.95 informed the appellant that it had to pay the undisputed balance amount of Rs.4.84 crores with interest at 17.5%. This amount was duly paid by the appellant, and it appears that after 1995 the entire dispute was treated as closed.

7. However, surprisingly, the appellant after three years received a letter on 5.2.1998 from the Department asking it to pay additional amount of Rs.3.1 crores on or before 11.02.1998, failing which recovery proceedings would be initiated against it under Rule 230.

8. It is alleged by the appellant that since it is a Public Sector Undertaking it could not file any case/appeal without clearance by a Higher Powered Committee in view of the decisions of the Supreme Court referred to later in this judgment . Hence, against the fresh demand of Rs.3.1 crores, the appellant wrote a letter on 24.04.1998 to the High Powered Committee seeking permission to file a petition before the Supreme Court against the fresh demand of Rs.3.1 crores. The appellant has alleged that it did not seek permission to file appeal before the Commissioner (Appeals), because the demand raised in the letter dated 5.2.1998 was not in pursuance of any show cause notice. Further, it could not be treated as an assessment order or an appealable order.

9. The High Powered Committee refused to grant permission to the appellant to file a petition before the Supreme Court, but instead passed the following order: -

> " The Committee, having, regard to the fact that the dispute under consideration had arisen out of fresh demand did not permit Madras Fertilizers Limited to file a petition in the matter in the Supreme court. The Committee instead advised Madras Fertilizers Limited to agitate the matter before the Collector (Appeals)."

10. Consequently, the appellant filed an appeal before the Commissioner (Appeals) on 27.10.98 pursuant to the directions of the High Powered Committee. However, the appeal was dismissed by the Commissioner (Appeals) by order dated 20.11.98 as barred by

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limitation. Against the order of Commissioner (Appeals), the appellant filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT), which was dismissed by the Tribunal by its order dated 26.4.2000. Aggrieved, the appellant filed a writ petition before this Court, which was dismissed by the impugned order dated 11.06.2001 by a learned single Judge, and hence this appeal.

11. In a long string of decisions of the Supreme Court, it has been repeatedly emphasized that disputes between the Central Government and the Public Sector Undertakings should first go before the High Powered Committee constituted by the Central Government, so as to conciliate the matter. Reference to these rulings have all been given in the latest decision of the Supreme Court in Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes, AIR 2004 SC 2434.

12. In Collector of Central Excise, Calcutta v. Jeesop and Co. Ltd., (1999) 9 SCC 181, reference to which has been made in the decision in Mahanagar Telephone Nigam Ltd. case (supra), the Supreme Court observed: -

> " Litigation between Central Government and Public Sector Undertakings is not to be resorted to without the matter being examined by a High Powered Committee of Secretaries and its clearance obtained."

The Supreme Court in the above said decision i.e., Collector of Central Excise, Calcutta v. Jeesop & Co. Ltd (supra) has relied on its earlier decisions in Oil and Natural Gas Commission v. Collector, 1992 (61) E.L.T 3(SC) and Oil and Natural Gas Commission v. Collector, 1994 (70) E.L.T 45 (SC).

13. In Chief Conservator of Forests v. Collector, (2003) 3 SCC 472, the Supreme Court observed: -

> "Under the scheme of the Constitution, Article 131 confers original jurisdiction of the Supreme Court in regard to a dispute between two states of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitutions or the C.P.C that two departments of a State or the Union of India will fight a litigation in a Court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a Court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in co-ordination and not in confrontations. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and

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> polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all inter-departmental controversies at the level of the Government and such matters should not be carried to a Court of law for resolution of the controversy. In the case of disputes between public sector undertakings and Union of India, this Court in Oil and Natural Gas Commission and another v. CCE (1992 Suppl (2) SCC 432) called upon the Cabinet Secretary to handle such matters. In Oil and Natural Gas Commission and another v. CCE (1995 Suppl (4) SCC 541), this Court directed the Central Government to set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior Officers only should be nominated so that the Committee would function with status, control and discipline."

Thus, the High Powered Committee constituted in pursuance of the orders of the Supreme Court was in the nature of in-house conciliation to avoid litigation between the Government and the Public Sector Undertakings. All Public Sector Undertakings hence have to necessarily approach the High Powered Committee before filing any appeal/case.

14. Mr.V.T.Gopalan, learned Additional Solicitor General of India, appearing for the Central Government, submitted that the appellant should have filed an appeal while simultaneously approaching the High Powered Committee in order to save limitation. However, Mr.Arvind P.Datar, learned senior counsel for the appellant, submitted that such an appeal could be filed only against an assessment order/adjudication order. As already stated above, after dismissal of the appellant's appeal by the Supreme Court on 20.01.94 the Assistant Collector issued letter dated 11.3.94 demanding Rs.8.94 crores from the appellant. This was disputed by the appellant, and the matter was discussed with the Principal Collector of Customs and Central Excise, who by letter dated 19.01.1995 informed the appellant that it had to pay undisputed balance amount of Rs.4.84 crores with interest at

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17.5%, and this amount had been paid by the appellant. Thus, it is alleged that after 1995 the entire dispute was closed. It was only subsequently that the appellant received a letter on 5.2.1998 asking it to pay additional amount of Rs.3.1 crores on or before 11.2.1998. Thus, it is alleged that the letter dated 5.2.98 was not an assessment or adjudication order. It was only a consequential letter, as the matter had already been concluded by the decision of the Supreme Court.

15. Since the appellant is a Public Sector Undertaking it had to get clearance from the High Powered Committee for litigating the matter. Against the demand raised by the Commissioner of Central Excise (Appeals) by letter dated 5.2.98, the appellant wrote a letter on 24.4.1998 to the High Powered Committee seeking permission to file a petition before the Supreme Court against the fresh demand of Rs.3.1 crores. The appellant states that it did not seek any permission to file any appeal before the Commissioner (Appeals) because the demand raised in the letter dated 5.2.1998 was not in pursuance of any show cause notice or assessment/adjudication order. In fact, the controversy had already been adjudicated by the judgment of the Supreme Court dated 20.01.1994. The High Powered Committee refused to grant permission to file appeal before the Supreme Court, but gave permission to file an appeal before the Collector (Appeals), which order was received by the appellant on 25.7.1998. The appellant then filed an appeal before the Commissioner (Appeals) on 27.10.98.

16. Learned senior counsel for the appellant submits that at the relevant point of time the appellant had 90 days to file an appeal under Section 35 of the Central Excise Act, 1944, and the Commissioner of Central Excise (Appeals) could condone the delay by a further period of 90 days. Thus, the appeal could have been preferred within 180 days. Although the appeal was filed after the period of 261 days from the date of receipt of the impugned order, the time taken to approach the High Powered Committee and obtain its order/permission was 92 days. If this period of 92 days is excluded, the appeal has been filed after 169 days, which is well within the total period of 180 days.

17. We agree with the submission of the learned senior counsel for the appellant. At the relevant time, the prescribed period for filing appeal under Section 35 of the Central Excise Act, 1944 was 90 days from the date of receipt of the order, and the Commissioner of Central Excise (Appeals) could condone the delay by further period of 90 days. Since the appellant had necessarily to approach the High Powered Committee (in view of the decisions of the Supreme Court referred to above) in our opinion the period spent in pursuing the matter before the High Powered Committee has necessarily to be excluded.

18. On the facts of the case, and since there has already been considerable delay in the matter, we condone the delay in filing the appeal before the Commissioner (Appeals).

19. The learned Senior Counsel for the appellant has relied on the decision of the Supreme Court in Union of India and Others

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Vs. Madhumilan Syntex Pvt. Ltd., 1988 (35) E.L.T. 349 and urged that a prior show cause notice must be served to the person against whom any demand is proposed to be made. A demand without notice or hearing is invalid, and post facto show cause notice cannot be regarded as adequate in law. The learned Senior Counsel further submitted that the show cause notice must set out the details of the claim, documents relied on, etc., and the manner in which the demand amount has been computed. He further submitted that this has not been done in the present case, and hence the impugned demand notice is illegal.

20. Apart from that, the learned Senior Counsel for the appellant has also submitted that the dispute relates to the period from 05.03.1976 to 29.03.1977. The Supreme Court judgment was rendered on 20.01.1994. Thereafter, the Assistant Collector (Central Excise) wrote the letter dated 11.03.1994 to the appellant demanding Rs.8.94 crores. Since, this was disputed, the matter was discussed with the Collector who by letter dated 19.01.1995 informed the appellant that it had to pay the amount of Rs.4.84 crores with interest, which was duly paid by the appellant, and the dispute was closed in the year 1995. Subsequently, the appellant received the letter dated 05.02.1998 demanding the additional amount which has been challenged herein. The learned Senior Counsel submitted that this letter dated 05.02.1998 was illegal, since it was time barred by virtue of Section 11A of the Central Excise Act and the proviso to that provision does not apply because there was no deliberate suppression by the appellant. He also submitted that this issue was raised before the Commissioner but he has not dealt with the same.

21. Since, we are remanding the matter to the Commissioner (Appeals) all the aforesaid submissions can be made before the Commissioner (Appeals).

22. In view of the above, we set aside the impugned order of the learned single Judge dated 11.06.2001; of the CEGAT dated 25.04.2000, and the Commissioner of Central Excise (Appeals) dated 20.11.98, and remand the matter to the Commissioner of Central Excise (Appeals) to pass a fresh order on merits in the light of the observations made above expeditiously. The impugned demand shall stand stayed till the decision by the Commissioner (Appeals).

23. In the result, the appeal is allowed, and the matter is remanded to the Commissioner (Appeals). No costs. Consequently, W.A.M.P is closed.

pv/sm

Sd/
Asst.Registrar

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Sub Asst.Registrar

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   Chennai - 600 018.

4. The Superintendent of Central Excise,
   317, Anna Salai,
   Chennai - 18.

+ 1 cc to Mr.Uttam Reddi Advocate SR No. 9339

+ 1 cc to Mr.S.Manikumar, SCGSC (SR No.9432)

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Judgment
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